

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Turlock, CA)

KOZY SHACK ENTERPRISES, INC.

Employer¹

and

Case 32-RC-5712

**TEAMSTERS UNION LOCAL 948,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

Kozy Shack Enterprises, Inc., herein called the Employer, is engaged in the business of the production, storage, and distribution of puddings and other desserts for wholesale distribution and retail sale. Teamsters Union Local 948, International Brotherhood of Teamsters, herein called the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time kitchen employees, packing employees, sanitation employees, quality assurance employees, maintenance employees, warehouse employees, mechanics, receiving and distribution employees, line operators, and forklift drivers, employed by the Employer at its Turlock, California facility, excluding all managers, supervisors, and guards as defined by the Act.

¹ The name of the Employer appears as amended at the hearing.

On February 12, 16, and 18, 2010, a hearing officer of the Board held a hearing, and the Employer filed a brief with me, which I have duly considered.

The only issue in dispute is the supervisory status of six leads in the Employer's kitchen and packing departments. The Employer seeks to exclude kitchen leads Alfredo Hernandez and Sergio Alvizo and packing leads Everardo Curiel, Guillermina Ramirez, Antonia Jaimez, and Arturo Martinez from the unit as supervisors within the meaning of Section 2(11) of the Act. It is undisputed that the leads have no authority to hire, suspend, lay off, recall, promote, discharge, reward, discipline, or to adjust employee grievances. However, the Employer contends that the leads have the authority to transfer, assign (including overtime), responsibly direct, effectively recommend hires, effectively recommend rewards, and effectively recommend discipline. Conversely, the Petitioner contends the leads are not statutory supervisors and should be entitled to vote.

The parties have stipulated to the Section 2(11) supervisory status of Production Manager Perfecto "Pete" Delgadillo, Production Supervisor Gerald Preston, and Kitchen Supervisor Mahesh Prakash. The parties have also stipulated that certain other undisputed leads, including quality control leads Beatriz Garcia and Bertha Gomez, finished goods/warehouse lead Carlos Madrigal, and sanitation lead Juan Diego Alvarez, are not statutory supervisors as they do not have the authority to hire, fire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them or adjust their grievances, and that they do not effectively recommend such actions.

There is no prior history of collective bargaining at the Turlock plant. The facility has a total workforce, including managers and supervisors, of approximately 110 employees.

I have carefully considered the evidence and the arguments presented by the parties on these issues and, as discussed below, I conclude, in agreement with the Petitioner, that the Employer has failed to satisfy its burden of demonstrating the Section 2(11) supervisory status of the six leads, and I accordingly direct that the leads are included in the unit and will be entitled to vote. I am directing an election in a unit that consists of approximately 106 employees.

To provide a context for my discussion of this issue, I will first provide an overview of the Employer's operations. Then I will present in detail the facts, case law, and reasoning that support my conclusions in this matter.

I. THE FACTS

A. The Employer's Operations

The Employer's Turlock facility is engaged in the manufacture, casing, packing, storage and shipping of refrigerated puddings. The Employer produces a variety of products including rice pudding, tapioca, chocolate pudding, flan, vanilla pudding, and banana pudding. The Employer operates two production shifts per day, a first shift from 5:00 a.m. to 12:30 p.m. and a second shift from 12:30 p.m. to 9:30 p.m. The Employer also operates one sanitation shift from 8:00 p.m. to 4:30 a.m.

B. Management Hierarchy

The highest ranking manager at the Turlock facility is Plant Manager Steve Padilla. Under Padilla is Production Manager Perfecto “Pete” Delgadillo who runs the day-to-day production operation at the plant, overseeing both the kitchen and the packing departments. Delgadillo arrives for work between approximately 4:15 and 4:30 a.m. and leaves work between approximately 2:00 and 3:00 p.m. Current Production Supervisor Gerry Preston began serving in that position in January 2010. Preston generally works from 11:00 a.m. to 8:00 or 9:00 p.m. Preston’s position was essentially newly created by the Employer in order to have a salaried manager on the second shift to oversee both the kitchen and the packing operations. Currently, the first shift leads report to Delgadillo and the second shift leads report to Preston. The second shift leads formerly reported to Hourly Supervisor Mahesh Prakash, who oversaw both the kitchen and packing operations. Prakash is currently serving as a salaried kitchen supervisor on the second shift.

C. The Production Department

The kitchen component of the Production Department prepares raw food by assembling and cooking the product. The packing department component of production is responsible for packing the finished product. Between the kitchen and the packing department, the product is handled by a chiller attendant who is considered a kitchen employee.

The first shift in the kitchen consists of lead Alfredo Hernandez, three line operators, an assistant line operator, two cooks, a chiller attendant, a batch weigher (also

known as a weight auditor), a kettle washer, and twelve line associates. Lead Alfredo Hernandez reports directly to Production Department Manager Delgadillo.

The second shift in the kitchen consists of Kitchen Supervisor Mahesh Prakash, lead Sergio Alvizo, three line operators, one relief line operator/cook/chiller attendant, two cooks, a chiller attendant, a batch weigher, a kettle washer, and nine line associates. Lead Sergio Alvizo reports to Kitchen Supervisor Mahesh Prakash and Production Supervisor Gerry Preston.

The first shift in packing is comprised of leads Everardo Curiel and Guillermina Ramirez, three line operators, one relief line operator, and twelve line associates. Leads Everardo Curiel and Guillermina Ramirez directly report to Production Department Manager Delgadillo.

The second shift in packing is comprised of leads Arturo Martinez and Antonia Jaimez, three line operators, a relief line operator, and thirteen line associates. Leads Arturo Martinez and Antonia Jaimez report to Production Supervisor Gerry Preston.

There are three main production lines in the kitchen, known as Lines 1, 4 and 5, which are utilized every day, along with Line 6, which is used only two to three times per week. Line 1 is used for the production of four ounce and six ounce Kozy Bowls. Line 4 is used for the production of the four ounce pack cup, known as the Gen X cup. Line 5 is used for the production of 22 ounce cups and 16 ounce cups. Less frequently used Line 6 is used for four pound containers. The determination of which lines are run is based primarily upon the size of the container which the Employer's Long Island, New York headquarters has ordered to be produced. To the extent that the production schedules

from New York leave any leeway for variation, the leads do not have the unilateral power to reprioritize or reorder production tasks, and would only do so after consultation with an upper manager such as Delgadillo in a regular daily meeting with first shift or second shift leads.

The line operators set up the lines, grease them up and do changeovers so that the line can transition between one product and another. The line associates in the kitchen rotate between lines every two hours and the line operators in the kitchen rotate daily. The packing employees rotate between lines every hour. All of the line operators are capable of operating all of the lines. Once product is cooked and created by the kitchen employees, the line associates put the pudding into baskets, then fill carts with the baskets, and then push the carts to the chiller attendant. Once transported to the chiller attendant, the product is chilled prior to its delivery to the packing department. Once the chilling process is completed, the line associates transfer the product to the packing department where packing line associates put it into the appropriate containers.

The leads spend virtually all of their time on the shop floor in the presence of the employees they oversee. Delgadillo spends 20 to 30% of his time on the shop floor and thus has his own opportunity to observe the work performance of all first shift kitchen and packing employees, and at least a portion of the shift of second shift kitchen and packing employees.

D. The Leads' Working Conditions

1. Promotion of Leads from Regular Positions

When second shift kitchen lead Sergio Alvizo was made a lead, he received no particular training or orientation as to how his duties or role would change as a lead. Alvizo was informed that he would be responsible for preparing efficiency reports, that he would be utilizing a computer, and that he should be careful not to run out of carts. However, he was not told that he would have the authority to effectively recommend discipline, he was not told that he would have the authority to effectively recommend employees for hire, and he was not instructed to pay particular attention to temporary employees because he would be evaluating their potential to be hired as regular employees. Similarly, when second shift packing lead Arturo Martinez was promoted to lead, he was only told by Delgadillo to “be on top of the people” and make “sure the product is ready,” but was not given any particular instruction on disciplinary matters or told that he would have any role to play in the hiring or selection of employees. The Employer did not provide any evidence regarding what other leads were told about any new power or authority he or she possessed upon being promoted to a lead.

In a 2008 performance appraisal of lead Guillermina Ramirez, the Employer expressed that “we are still looking into supervisory training for Guillermina and other leads.” However, despite this intent, the Employer provided no evidence that it ever provided any supervisory training to Ramirez or any other leads.

2. Leads' Pay and Benefits

First shift kitchen lead Alfredo Hernandez earns \$14.36 per hour. Second shift kitchen lead Sergio Alvizo earns \$13.40 per hour. First shift packing lead Everardo Curiel earns \$15.23 per hour. Fellow first shift packing lead Guillermina Ramirez earns \$12.88 per hour. Second shift packing lead Arturo Martinez earns \$13.60 per hour. Fellow second shift packing lead Antonia Jaimez earns \$12.88 per hour. Quality control leads Beatriz Garcia and Bertha Gomez earn \$15.38 and \$13.55 respectively. Sanitation lead Juan Diego Alvarez earns \$10.72 per hour and warehouse lead Carlos Madrigal earns \$13.52 per hour. As previously noted, no party asserts that the sanitation lead, quality control leads or warehouse lead are statutory supervisors.

Both the leads and the rank and file employees are paid on an hourly basis. The leads are in Pay Band 5 (ranging from \$10.72 to \$15.86 per hour) which is the highest of the five pay bands used for hourly employees at the facility. Because of the wide range of salaries across each pay band, it is possible for more senior line associates to earn more money per hour than a more junior lead. For example, the record reflects the existence of a senior line operator in Pay Band 3 earning \$11.17 per hour, and a relief line operator in Pay Band 3 earning \$11.47 per hour, both of which are more than the \$10.72 earned by junior sanitation lead Juan Diego Alvarez in Pay Band 5. The Employer's pay chart also reflects cooks in pay bands 1, 2 and 3 earning \$11.57, \$11.52, \$11.42, and \$11.37, all in excess of the \$10.72 earned by Juan Diego Alvarez.

The leads receive the same vacation and fringe benefit packages available to regular employees.

3. Simplicity of the Work

Employees know which line or work station they are to report to each day without the need for any instruction or guidance from any lead. Delgadillo testified that there are essentially no differences between the work performed by line operators in the kitchen and line operators in the packing department, between the work performed by line associates in the kitchen and line associates in the packing department, or between the leads in any of the departments. In fact, there is substantial evidence that the employees at the facility are largely fungible. Second shift packing lead Arturo Martinez testified that line associates perform the same basic tasks regardless of which line they are working on. Similarly, second shift kitchen lead Sergio Alvizo testified that the work is sufficiently basic that he need not spend much time training temporary employees or new employees because temporary employees or new employees readily learn how to perform their jobs by watching non-lead, non-supervisory co-workers. Furthermore, first shift kitchen lead and Employer witness Alfredo Hernandez admitted that line associates rarely make errors so there is little need for leads to correct them. Employee Maricela Rodriguez, who worked both in packing and in the kitchen while working as a temporary employee from July 2008 to July 2009 described the work as “really easy to learn” and stated that she learned how to do her job from co-workers without suggesting any particular training from leads.

Delgadillo testified that first shift packing leads Everardo Curiel and Guillermina Ramirez notice who works faster and slower, and then try to put such persons together so that all teams are essentially working the same speed. Shortly after becoming second

shift packing lead, Arturo Martinez recommended to Delgadillo and Prakash that his packing crew be split up into two groups so that the employees would work more efficiently and productively. Delgadillo approved Martinez's recommendation, which was largely premised on his observation of employees who were either talking excessively or were not at their work stations at all.

E. The Lead's Authorities

1. Recommendations to Hire Temporary Employees

The Production Department routinely uses temporary employees supplied by a temporary agency to work as line associates and line operators. Delgadillo testified that first shift kitchen lead Alfredo Hernandez recommended the hiring of temporary employees Sylvia de Gazcon de Gracia and Eric Godinez; second shift kitchen lead Sergio Alvizo recommended the hiring of temporary employees Maricela Rodriguez, Angelina Lopez, and Lucia Flores; first shift packing lead Everardo Curiel recommended the hiring of temporary employees San Juana Diaz and Maria Nunez; first shift packing lead Guillermina Ramirez recommended the hiring of temporary employees Angelica Andrade and Rosalva Pantoja; second shift packing lead Arturo Martinez recommended the hiring of temporary employees Maria D. Lopez and Rosario (Last Name Unknown) who no longer works for the Employer, not current employee Rosario Del Toro; and second shift packing lead Antonia Jaimez recommended the hiring of temporary employees Rosario Del Toro and Maria M. Lopez. In contrast, leads Arturo Martinez and Sergio Alvizo testified that they did not recommend that any temporary employees be made permanent employees, they did not evaluate their work, they did not suggest that

they apply for a permanent position, and essentially had no role in the conversion of any temporary to permanent employee. While lead Alfredo Hernandez corroborated Delgadillo's testimony with respect to his having recommended that two temporary employees be converted to permanent employees, he further testified that he believed Delgadillo independently interviewed them before they were hired, an assertion denied by Delgadillo.

The record also reflects that temporary employees who are converted to a regular position then undergo an initial 90-day probationary period in order for the Employer to ascertain whether they are performing satisfactorily as regular employees. The Employer contends that the leads made recommendations regarding whether such temporary employees had successfully completed their probation periods, which evidence is categorically denied by leads Martinez and Alvizo.

2. Scheduling Employees

The leads and regular employees all punch into the same time clock. In the kitchen, the second shift employees all begin work at either 12:30 p.m., 1:00 p.m. or 1:20 p.m. pursuant to the weekly schedule created by Delgadillo which no lead plays a part in preparing. Although the Employer did not place any comparable written schedule for the first shift in the kitchen into the record, there is no basis for concluding that the practice is any different from the second shift. First shift kitchen lead Alfredo Hernandez testified that he routinely receives a schedule generated by Delgadillo listing which employees will be available to work as well as their start and end times.

While there was testimony from Delgadillo that packing leads create schedules which are not written, second shift packing lead Arturo Martinez testified that there are written schedules in a hallway near the packing area, but he plays no role in deciding which employees are placed on the schedule, what times they will be expected to report to work or leave from work, or any other role with respect to the generation or development of such a schedule.

3. Participation in Employee Performance Appraisals

The Employer utilizes standardized Non Exempt Annual Review forms to evaluate employees each December, using the same performance appraisal forms and point system as to leads that it uses in the course of evaluating the production employees who report to the leads. Thus, there is no place on the appraisal form specifically designated for the Employer to evaluate and discuss the extent to which the lead is held accountable for the work of other employees. The standard appraisal forms do not contain any signature block or space for leads to sign off on. Delgadillo testified that he initially fills out the performance appraisal forms by hand while meeting with the lead, and only types up the formal versions on preset forms on a computer thereafter. Delgadillo testified that he consulted with first and second shift leads in connection with performance appraisals in 2007, but second shift leads Sergio Alvizo and Arturo Martinez deny that they have ever been consulted about any employee performance appraisals. In 2008 and 2009, Delgadillo testified that he only consulted with first shift leads and not second shift leads in the course of preparing performance appraisals, relying instead on then Hourly Supervisor Mahesh Prakash for input as to ratings for

second shift employees. The Employer presented evidence from first shift lead Alfredo Hernandez to corroborate that he was involved in rating the employees on his shift but did not present any corroborating evidence from first shift leads Elverardo Curiel and Guillermina Ramirez regarding their participation in rating the employees who report to them.

Delgadillo further testified that he always accepts whatever numerical score is recommended by a lead to calculate employees' ratings. However, the Employer also provided the testimony of lead Alfredo Hernandez regarding the December 2008 performance appraisal of Iraith Rodriguez, who ultimately received scores of "3" in the categories "Initiative" and "Teamwork". Hernandez testified that he wanted to give Rodriguez scores of "4" in both the Initiative and Teamwork categories, and that "4" is written and circled on Rodriguez' appraisal. Hernandez also testified that he reported other information regarding Rodriguez' performance to Delgadillo which failed to appear on the final version of Rodriguez' performance appraisal as issued by Delgadillo.

All of the performance appraisal forms utilize the following points system: 55-82 Unacceptable; 83-137 Marginal; 138-192 Meets Expectations; 193-247 Commendable; and 248-275 Exceptional. In 2008 and 2009, no employee received a score higher than 192, the upper end of the Meets Expectations range. Further, the record also established that all of the employees in the Meets Expectation range in 2009 received 3% raises and no more, rather than there being a variety of raise amounts or percentages based on a variety of point scores. Delgadillo claims that he never changed the performance appraisal scores given by any of his leads and that Plant Manager Steve

Padilla did not change any of the scores noted by Delgadillo on the final version of the performance appraisals. The Employer asserts that it bases employees' merit increases solely on the total score derived from the performance appraisal.

4. Assignment of Overtime

The record is clear that Delgadillo and not first shift kitchen lead Alfredo Hernandez is the person who determines whether overtime is necessary in the kitchen, that Hernandez has never forced anyone to work overtime, and that Hernandez bases decisions as to who will receive overtime on seniority, as opposed to skill levels, or other considerations. Similarly, both second shift kitchen lead Sergio Alvizo and second shift packing lead Arturo Martinez testified that Delgadillo or Prakash rather than any lead makes any decision as to whether overtime work is necessary, and that the leads lack the power to direct employees to work overtime. Both leads Alvizo and Martinez further testified that seniority, rather than an assessment of skill levels, dictates which employees receive the opportunity to work overtime.

5. Daily Production Meetings

At 4:45 a.m. each day, Production Manager Delgadillo meets with the kitchen, packing and other leads for the first shift. At 12:30 p.m. each day, Delgadillo meets with the kitchen, packing and other leads for the second shift. At such meetings, Delgadillo and the leads review production schedules that are prepared by the Employer's New York headquarters which strictly delineate the products to be made and their quantities. The Employer did not supply any evidence that the leads actively participate in such meetings rather than just passively receive information. The Employer also introduced no

evidence that leads or indeed any Turlock personnel have the authority or ability to countermand the production orders from New York, nor did it introduce any evidence that leads participated in any meetings of upper management such as those convened between Plant Manager Steve Padilla and managers from the Employer's New York headquarters.

6. Leads' Authority to Transfer Employees

Transfer decisions are not based on a comparison of employee skill levels done by leads using independent judgment, but rather on other factors such as job classifications and seniority. For example, if there is a partial line shutdown in the kitchen, it appears that line associates on that line will be sent to work in packing, while line operators may remain in order to grease the line so that it is ready when it resumes being operational. If some line operators or line associates are to be sent to packing while others remain in the kitchen, those employees with greatest seniority will be given the choice of remaining in the warmer and therefore arguably more desirable kitchen. Second shift kitchen lead Sergio Alvizo testified that Kitchen Supervisor Mahesh Prakash, rather than lead Alvizo, makes any determination as to whether employees will be transferred from packing to the kitchen. Similarly, second shift packing lead Arturo Martinez testified that he plays no role with respect to transfers of employees from one department to another. Finally, the record only reflects a single unnamed individual who ever received a differential based on a transfer to a higher skilled job than her usual classification.

7. Lead's Participation in the Disciplinary Process

The Employer asserts that it uses a progressive discipline system in which employees go from documented verbal warning, to written warning, to final warning to suspension, to termination. The Employer provided no evidence of any instances in which any leads ever recommended or had occasion to recommend that steps in the Employer's progressive discipline system be jumped or skipped. As discussed further below, the Employer has also generally failed to provide evidence that leads ever recommended that employees receive a specific level of discipline. Instead, leads have generally recommended "corrective action," leaving it to Delgadillo to determine the appropriate level of discipline in light of any disciplines that the given employee might have received in the past, which Delgadillo finds from perusing the employee's work record and making his own judgment about the type of discipline to impose.

The Employer introduced into evidence several disciplines assertedly stemming from effective recommendations by leads, and several performance appraisals which mentioned or cross-referenced verbal counselings or corrective actions it asserts leads had previously issued to employees. As set forth below, these disciplines fall into certain broad categories. Further, the Employer did not place in the record any written discipline of an employee signed by a lead. Instead, Delgadillo admitted that he, rather than any lead, prepares all writeups.

The vast majority of disciplines put in the record by the Employer, as well as the previous disciplines referred to in many of the performance appraisals proffered by the Employer, were examples of recording clear and obvious employee errors. For example, the Employer introduced various disciplines involving the failure to move or remove

online screens in preparation for a Cleaning in Process (CIP) run, a clear and visible error that was readily apparent to the next oncoming shift. The Employer also introduced disciplines reflecting basic misbatching errors where the wrong raw materials were utilized in clear violation of Employer policy and contrary to instructions from the Employer's New York headquarters. Other discipline involved the same types of miscoding errors in which improper dates or expiration dates were marked on products rendering them unsellable, again visible and obvious errors necessitating discipline. The Employer also placed into evidence certain attendance-based employee disciplines, which simply require leads to make a mere numerical calculation of previous absences or tardies on the part of the particular employee. Another example is the first written warning issued to second shift packing line associate Maria Guzman which issued after lead Arturo Martinez conveyed to Delgadillo that he had received numerous complaints from Guzman's co-workers about Guzman's behavior and her treatment of them. Thus, Martinez's role in this regard was purely reportorial.

The Employer did not introduce any evidence that other discipline included in the record resulted from any recommendation on the part of a lead. Similarly, as to several other disciplines, a lead at most generally recommended "corrective action" or that something needed to be done, but did not recommend that a specific level of discipline be applied to the particular employee.

The Employer also offered into evidence disciplines as to which the testimony regarding the leads' role was contradictory. For example, Delgadillo initially conceded that leads play no role with respect to discipline of employees related to attendance

issues. Such an admission appears to be warranted in light of the fact that only Delgadillo and not leads has the power to check the voice mail box where employees are supposed to call in order to notify the Employer and justify any absence from work. However, Delgadillo then called his own concession into question by seeking to establish that first shift packing lead Everardo Curiel played a part in recommending corrective action for employees Senaida Jimenez and Maria Irasava for attendance reasons. The Employer provided no evidence to clear up this apparent inconsistency within Delgadillo's testimony. In addition, there are also many instances in which the testimony of Delgadillo is in direct conflict with that of leads Sergio Alvizo and Arturo Martinez. For example, Delgadillo claims to have relied upon input from leads Alvizo and Martinez in the course of disciplining employees Tomas Sanchez and Juana Gazcon, but Alvizo and Martinez deny that they played any role in recommending discipline of or providing information for performance appraisals of these or any other employees.

There are also several instances in which Delgadillo's testimony with respect to leads' involvement in recommending certain disciplines is uncorroborated. See January 12, 2010 and November 19, 2008 verbal warnings to Laura Lopez (no testimony from Lopez or Alfredo Hernandez) and January 12, 2010 and November 19, 2008 verbal warnings of Tomas Sanchez (no testimony from Sanchez or Alfredo Hernandez).

II. ANALYSIS

The Employer contends that kitchen leads Alfredo Hernandez and Sergio Alvizo and packing leads Everardo Curiel, Guillermina Ramirez, Antonia Jaimez, and Arturo Martinez are statutory supervisors within the meaning of Section 2(11) of the Act and

must be excluded from the unit because they possess the authority to transfer, assign (including overtime), responsibly direct, effectively recommend hires, effectively recommend rewards, and effectively recommend discipline. The Petitioner contends the leads are not supervisors under the Act and they should be included in the unit.

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” Individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 listed supervisory functions; (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Kentucky River*, 532 U.S. at 711-712. When dealing with issues concerning supervisory status, the Board cautions against construing supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect. *Oakwood*, 348 NLRB at 688 (quoting *Chevron Shipping Co.*, 317 NLRB 379, 380-381 (1995)). In *Oakwood*, the Board observed that the term supervisor was not intended to include “straw bosses, lead men, and set-up men,” who are protected

by the Act even though they perform “minor supervisory duties.” (citing *NLRB v. Bell Aerospace Company*, 416 U.S. 267, 280-281 (1974). 348 NLRB at 688. For the Employer to satisfy this burden, it must do so by a preponderance of the credible evidence. *Oakwood*, 348 NLRB at 694; *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970).

The Board requires actual evidence of supervisory authority. Job descriptions and other paper authority, without more, are not given controlling weight. See *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (testimony utterly lacking in specificity does not satisfy burden of establishing supervisory status); *Golden Crest Healthcare Center*, 348 NLRB No. 727, 731 (2006) (purely conclusory evidence is not sufficient to establish supervisory status); *Chevron Shipping Company*, 317 NLRB 379, 381 n. 6 (1995). Although Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, the evidence still must suffice to show that such authority actually exists. *Avante at Wilson*, 348 NLRB No. 71, 1057. Where evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 792 (2003); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Further, any lack of evidence in the record is

construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n. 8 (1999).

To meet this burden, the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. To exercise independent judgment, an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or the provisions of a collective bargaining agreement. *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Independent judgment requires that the decision rise above the merely routine or clerical. *Oakwood*, 348 NLRB at 692.

In this case, it is the Employer who is asserting that the leads are supervisors, and therefore it has the burden of establishing the supervisory status of these positions. For the reasons set forth below, I find that the Employer has failed to satisfy its burden in this regard. I turn now to the specific indicia.

A. The Authority to Assign Work

In *Oakwood*, the Board interpreted the term "assign" as referring to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall

duties, i.e., tasks, to an employee. *Oakwood*, 348 NLRB at 689; *I.H.S. Acquisition No. 114, Inc., d/b/a Lynwood Manor*, 350 NLRB 489 (2007). However, the authority to make an assignment, by itself, does not confer supervisory status. To establish supervisory authority, the putative supervisor must also use independent judgment when making such assignments. This means that the individual must exercise authority that is free from the control of others, and make a judgment that requires forming an opinion or evaluation by discerning and comparing data. The touchstone is the degree of discretion exercised by the purported supervisor, not whether the discretion involves technical or professional judgment. In *Oakwood*, the Board recognized the spectrum between situations involving little discretion where there are detailed instructions for the actor to follow from situations where the actor is wholly free from constraints. 348 NLRB at 693. While judgment is not independent if it is dictated or controlled by detailed instructions, it is independent where the policy allows for discretionary choices. *Id.* Additionally, the judgment must “rise above the merely routine or clerical” for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing data. *Oakwood*, 348 NLRB at 693.

Applying this framework, it is first necessary to consider whether the leads here make assignments, then if so, whether they use independent judgment in making the assignments. As discussed below, I conclude that, to the limited extent that leads make assignments, these assignments do not require the degree of independent judgment required by Section 2(11) to support a finding of supervisory status.

In this regard, I initially find that the Employer has not submitted evidence to support any contention that the leads assign employees to a particular time. Instead, the record makes clear that in the kitchen, the second shift employees all begin work at either 12:30 p.m., 1:00 p.m. or 1:20 p.m. pursuant to the weekly schedule created by Delgadillo which no lead plays a part in preparing. While no comparable written schedule for the first shift in the kitchen was included in the record, there is no basis for concluding that the practice is any different than on the second shift. First shift kitchen lead Alfredo Hernandez testified that he routinely receives a schedule generated by Delgadillo listing which employees will be available to work and their start and end times. While there was testimony from Delgadillo that packing leads create schedules which are not written, second shift packing lead Arturo Martinez conversely testified that there are written schedules in a hallway near the packing area but that he plays no role in deciding which employees are placed on the schedule, what times they will be expected to report to work or leave from work, or any other role with respect to the generation or development of such a schedule. Because neither of the first shift leads testified, the Employer has failed to demonstrate that the first shift in the packing department does not utilize written schedules. In addition, I find it implausible that a crew of over 16-17 employees per shift would know when to report and to leave if no written schedules existed.

The Employer next argues that the disputed leads have the power to assign overtime to employees without any input from managers above them such as Production Manager Delgadillo or former Hourly Kitchen and Packing Supervisor and current Kitchen Supervisor Mahesh Prakash. I find this argument unpersuasive. Initially, first

shift kitchen lead Alfredo Hernandez made clear that Delgadillo and not Hernandez is the person who determines whether overtime is necessary in his department, that Hernandez has never forced anyone to work overtime, and that Hernandez bases decisions as to who will receive overtime on seniority, as opposed to skill levels, or other considerations. Similarly, both second shift kitchen lead Sergio Alvizo and second shift packing lead Arturo Martinez testified that Delgadillo or Prakash, rather than any lead, makes any decision as to whether overtime work is necessary, and that the leads lack the power to direct employees to work overtime. See *Golden Crest Healthcare*, 348 NLRB 727, 729 (2006) (putative supervisor who lacks the power to compel, rather than merely request employees to take a certain action, does not possess requisite supervisory authority). Both Alvizo and Martinez further testified that seniority (rather than an assessment of skill levels) dictates which employees receive the opportunity to work overtime. Therefore, given the conflict in testimony between Delgadillo on the one hand and Hernandez, Alvizo and Martinez on the other hand, the Employer has failed to satisfy its burden of establishing the role of leads in assigning overtime to employees. I also note the absence of any testimony from any witnesses to the effect that leads have power to call an employee on his or her day off and ask him or her to come in to work. It is apparent that only Delgadillo, Preston, or Prakash possess such authority. See *A & G, Inc. d/b/a Alstyle Apparel*, 351 NLRB 1287, 1298 (2007) (any lack of specific evidence to support a finding of supervisory status is construed against the party asserting supervisory status).

The Employer next takes the position that the leads satisfy the *Oakwood* criterion of assigning employees to a place by determining the production line to which each employee, particularly line associates, will be assigned. However, I find that even if one assumes, for purposes of argument, that such assignments are made, the evidence does not establish that leads utilize independent judgment in the course of making such assignments. I initially note that the types of products and their quantities are initially dictated by the Employer's New York headquarters, without any input from anyone at the Turlock facility, much less its leads.

While Plant Manager Steve Padilla and, to a lesser extent, lead Alfredo Hernandez testified in a conclusory manner that leads decide which lines will run, I instead find, based on the record as a whole, that the determination of which lines are run is based primarily upon the size of the container which the New York headquarters has ordered to be produced. Thus, as previously noted, Line 1 is used for the production of four ounce and six ounce Kozy Bowls. Line 4 is used for the production of the four ounce pack cup (known as the Gen X cup). Line 5 is used for the production of 22 ounce cups and 16 ounce cups. Furthermore, Delgadillo testified that there are essentially no differences between the work performed by line operators in the kitchen and line operators in the packing department, between the work performed by line associates in the kitchen and line associates in the packing department, or between the leads in any of the departments. Second shift packing lead Arturo Martinez testified that line associates perform the same basic tasks regardless of which line they are working on. The December 2008 performance appraisal of kitchen cook Tomas Sanchez shows that he

also has worked as a line operator and in sanitation. Similarly, second shift kitchen lead Sergio Alvizo testified that the work is sufficiently basic that he need not spend much time training temps or new employees because temps or new employees readily learn how to perform their jobs by watching non-lead, non-supervisory co-workers. Furthermore, first shift kitchen lead and Employer witness Alfredo Hernandez admitted that line associates rarely make errors so there is little need for leads to correct them. Employee Maricela Rodriguez, who worked both in packing and in the kitchen while working as a temp from July 2008 to July 2009 described the work as “really easy to learn” and stated that she learned how to do her job from co-workers without suggesting any particular training from leads. To the contrary, Rodriguez focused more on what her co-workers were doing than on what lead Alvizo was doing. Because of the constraints imposed by the production process itself, the specifications dictated by the Employer’s New York headquarters, and the rudimentary if not menial nature of much of the work performed by the employees, I find that the assignment of employees to certain lines does not require independent judgment on the part of the disputed leads. Decisions made on the basis of well-known and limited skills are simply a routine matching of skills to requirements and do not require meaningful discretion. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002); *Clark Machine Corp.*, 308 NLRB 555, 555-556 (1992).

While Delgadillo testified that first shift packing leads Everardo Curiel and Guillermina Ramirez notice who works faster and slower, and then try to put such persons together so that all teams are essentially working the same speed, I find that such observation and reassignment constitutes nothing more than an equalization or balancing

of workloads, which is routine and clerical by nature and does not implicate independent judgment, even if it is made free from the control of others and even if it involves forming an opinion by discerning or comparing data. *Oakwood*, 348 NLRB at 692-693; *Golden Crest*, 348 NLRB at 730 n. 9. The Employer also relies upon a situation in which lead Arturo Martinez recommended to Delgadillo and Prakash that his packing crew be split up into two groups so that the employees would work more efficiently and productively. While this example arguably establishes that Martinez assigned employees to crews or subgroups, I nevertheless find that the recommendation by Martinez did not require independent judgment on his part because it was largely premised on his observation of employees who were either talking excessively or were not at their work stations at all. Observing and correcting such behavior does not require independent judgment of the type contemplated as to charge nurses in *Oakwood*.

The rotation of tasks among employees at the Turlock facility does not alter the analysis. In *Croft Metals*, the Board found that switching of tasks by leads among employees assigned to their line or department was insufficient to confer supervisory status. 348 NLRB at 722. See also *Alstyle Apparel*, 351 NLRB at 1304 (“the shift leaders did not determine which machines would operate, and their assignments to employees were dictated solely by machine availability and employee capability, the determination or guidelines for which rested elsewhere. The shift leaders’ machine assignments are analogous to the rotation of different tasks described in *Croft Metals*, which, in the Board’s view, more closely resembles ad hoc instruction than work assignment and does not reflect the authority to assign as described in *Oakwood*”). In the

instant case, the rotations seem to be entirely routine and automatic (occurring every hour in the packing department, every two hours as to line associates in the kitchen, and each day as to line operators in the kitchen) rather than based upon any assessment by leads as to the skills and capabilities of the employees being rotated. See also *Loparex LLC*, 353 NLRB No. 126, slip op. at 2 (2009) (shift leaders authority to direct employees to work on particular machines did not amount to assigning but instead was ad hoc instruction that employees perform discrete tasks, where shift leaders only sometimes considered capabilities of crew members, sometimes made decisions randomly, and sometimes left crew members on same machines day after day).

In sum, the employees' duties are a function of their classifications and are performed without significant instruction or oversight. To the extent that leads occasionally assign duties to employees on their shifts, they do so without independent judgment. In this regard, the employees' duties are routine and well-known, and the record evidence does not establish that their respective skills differ significantly or that, in making assignments, it is necessary for the leads to consider the relative skills or strengths of the employees trained on a particular task. This lack of specific evidence is construed against the Employer. *Golden Crest Healthcare Center*, 348 NLRB 727, 731; *Avante at Wilson*, 348 NLRB at 1057 (2006); *Michigan Masonic Home*, 332 NLRB 1409 (2000).

B. The Authority to Responsibly Direct Work

In *Oakwood*, the Board explained responsible direction as follows: "if a person on the shop floor has 'men under him,' and if that person decides 'what job shall be

undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible. . . and carried out with independent judgment.'" Responsible direction, in contrast to assignment, can involve the delegation of discrete tasks as opposed to overall duties. *Oakwood*, 348 NLRB at 691. However, an individual will be found to have the authority to responsibly direct other employees only if the individual is accountable for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Oakwood*, 348 NLRB at 692. The assignment of tasks in accordance with an employer's set practice, pattern, or parameters, or based on routine or obvious factors, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

Applying the standard set forth above, I find that the record supports the contention that the leads in this case have men and women under them who they oversee on a daily basis. There is ample testimony in the record that the leads spend virtually all of their time on the shop floor in the presence of the employees they oversee. I next turn to the issue of whether the leads decide what job shall be undertaken next or who shall do it. In this regard, I find that there is considerable doubt as to whether leads perform such a role. As noted above, it appears that the nature of the products to be produced are

dictated by the Employer's New York headquarters and simply communicated to the Turlock facility without any ability of the Turlock facility to disregard or countermand New York's marching orders. Further, to the extent that the production schedules from New York leave any leeway for variation, the leads do not have the unilateral power to reprioritize or reorder production tasks and would only do so after consultation with an upper manager such as Delgadillo in a regular daily meeting with first shift or second shift leads. There is also evidence that employees know which line or work station they are to report to each day without the need for any instruction or guidance from any lead. Notwithstanding these doubts, I will assume that there is sufficient evidence that leads decide which jobs shall be undertaken next and who shall perform them, and thus turn to the next issue of whether leads are held accountable for the performance of their alleged subordinates.

In *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006), the Board offered as an illustration of accountability the issuance of written warnings to leads because of the failure of their crews to meet production goals. Conversely, in *Oakwood Healthcare, Inc.*, 348 NLRB 686, 695 (2006), the Board found that the charge nurses in that case did not responsibly direct because the discipline introduced in that case showed only that the charge nurses had been accountable for their own performance or lack thereof, not the performance of others. As I now explain, I find the examples proffered by the Employer to be deficient insofar as they only establish the accountability of leads for their own mistakes, not for the mistakes of those under them. In its brief, the Employer points to the December 2009 performance appraisal of second shift kitchen lead Sergio Alvizo

wherein Alvizo received a quality score of “2” for “failing to assure his employees properly coded the product.” The Employer also relies upon the September 23, 2009 suspension of Alvizo and an August 6, 2009 final warning to Alvizo which appear to be the same disciplines mentioned in the December 2009 performance appraisal. While it is undoubtedly true that these incidents arose because of an original miscoding or improper lid error on the part of second shift kitchen line operator Juana Gazcon, it appears from the face of the disciplines themselves, that Alvizo was disciplined for his own failure to verify that the correct coding or correct lids had been used by Gazcon and/or for his falsely or mistakenly claiming that he had performed such a verification when in fact he had not.

The Employer also offered the December 21, 2009 performance appraisal of second shift packing lead Guillermina Ramirez and its comment “there has been some errors on coding and not certifying pallet properly”, ostensibly as an example of Ramirez being held accountable for the performance of one or more employees on Ramirez’s shift. However, this point was not established given that Delgadillo made clear that the basis for mentioning this on Ramirez’s performance appraisal was Ramirez’s own error, not the error of someone beneath her.

In sum, because the disciplines and performance appraisals introduced by the Employer reflect leads being disciplined or downgraded because of their own errors, particularly since verification is expressly an aspect of leads’ own performance, rather than for the errors of others or for failing to motivate their employees to reach production goals as discussed in *Oakwood*, I find that the Employer has not established that the leads

are accountable, as necessary to show responsible direction under *Oakwood* and its progeny.

Finally, even if I were to view the corrective action notices and performance appraisals introduced into evidence by the Employer as demonstrating accountability, which I do not, I would nevertheless find that the Employer has failed to satisfy its burden of demonstrating that the leads exercise independent judgment in the course of responsibly directing employees. In *Croft Metals*, although finding that the leads therein both directed employees and were held accountable for the job performance of the employees assigned to them, the Board determined that the leads were not supervisors because the employees “generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance.” 348 NLRB at 722. The *Croft Metals* Board found that the leads failed to exercise independent judgment in the course of responsibly directing employees because there was little to no evidence of the factors weighed or balanced by leads in making production decisions and directing employees, such that the Board was unable to conclude that the degree of discretion involved in the activities rose above the routine or clerical. 348 NLRB at 722. The same absence of evidence of discretion holds here. Given the lack of guidance that the employees require, I find that any discretion exercised by the leads in responsibly directing employees does not rise above the routine or clerical. Thus, even if I were to find that accountability of leads had been demonstrated, which I do not, I would nevertheless conclude that the Employer had established that the leads exercise independent judgment in the course of responsibly directing employees.

As a final point with respect to responsible direction, I also find it significant that the Employer utilizes the same appraisal forms to evaluate leads that it uses in the course of evaluating the rank and file employees beneath the leads. Thus, there is no place on the appraisal form specifically designated for the Employer to evaluate and discuss the extent to which the lead is held accountable for the work of other employees. See *Loparex LLC*, 353 NLRB No. 126, slip op. at 15-16 (2009) (relying upon fact that form used by employer to rate shift leaders is same form used to rate performance of crew members working under shift leaders). In the *Loparex* case, the Board also relied on the fact that the appraisal forms did not rate the shift leaders on their success directing, assigning work to, disciplining or otherwise supervising crew members. *Id.* Similarly, in the instant case, the appraisal forms for leads rate them on job knowledge, quality, productivity, initiative, teamwork, safety habits, attendance, punctuality, organization and control of costs, but not on assignment or direction of work to others. The use of the same forms to rate leads and other employees, like the identical wording of the disciplines to lead Sergio Alvizo and non-lead Juana Gazcon, suggests that leads are held to no higher or different standards than are regular employees.

C. The Authority to Recommend Discipline

I now turn to the Employer's contention that the leads have the authority to effectively recommend the discipline of employees. To confer supervisory status based on this criterion, the evidence must establish that the disputed supervisor's participation in the disciplinary procedure leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health*

Agency, 337 NLRB 826, 830 (2002), citing *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). In this regard, the Board has consistently held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). The Board has also held that the issuance of oral warnings in and of itself does not demonstrate supervisory authority. *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999). The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home*, 324 NLRB 61 (1997).

Despite the substantial number of disciplines placed into the record by the Employer, I find that the Employer has not satisfied its burden here because of a number of factors, at least one and sometimes more of which apply to each discipline. These factors include: (1) mixed, conflicting or internally contradictory evidence; (2) no lead role in recommending discipline; (3) a purely reportorial role by leads in reporting incidents that could potentially engender discipline, including no recommendation of any specific level of discipline; and (4) the absence of discretion or independent judgment on the part of leads in the course of recommending discipline.

Viewing the matter broadly, I initially note that the Employer did not introduce a single written discipline of any employee signed by any lead. Instead, Delgadillo admitted that he, rather than any lead, prepares all writeups. The absence of such a

“paper trail” is, in and of itself, suggestive of the absence of a meaningful role of leads in the disciplinary process. I also deem it significant that there is no evidence in the record of any lead ever recommending that any employee receive a certain level of discipline. Instead, the evidence from Delgadillo and Hernandez largely consists of anecdotes in which a lead, at best, suggested “corrective action” and, at worst, suggested that some action needed to be taken, which does not necessarily even rise to the level of a corrective action. The authority to point out and correct differences in the job performance of other employees does not establish the authority to discipline. *Regal Health and Rehab Center, Inc.*, 354 NLRB No. 71, slip op. at 8 (2009) (citing *Franklin Hospital Medical Center*, 337 NLRB 826, 830 (2002)).²

Finally, even if one assumes that the leads recommended disciplinary action, there is no evidence that the recommendations were premised upon the exercise of discretion or independent judgment. The Employer purports to use a progressive discipline system in which employees go from documented verbal warning to written warning to final warning to suspension to termination. The Employer did not point to any instances in which any employees have been terminated. While there appear to be instances in which steps in the Employer’s progressive discipline system were jumped or skipped, the

² While the law in this area is not entirely settled, it appears that the Board has in the past recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further discipline or otherwise affect job status. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393-394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987). *Croft Metals* itself suggests a distinction between effectively recommending discipline on the one hand and taking corrective action on the other when it notes that although “the record evidence was too equivocal to establish that lead persons possess the independent authority to discipline or to effectively recommend discipline of employees within the meaning of Section 2(11), witnesses did testify that lead persons would take corrective action such as verbal warnings or escorting noncompliant employees to the company’s personnel office or higher plant supervisors.” 348 NLRB at 722, n. 13.

Employer offered no record evidence regarding why such steps were skipped, much less proof that leads were in any way involved. Nor did the Employer elicit any evidence that any lead ever recommended or had occasion to recommend that a step in the disciplinary process be skipped. Instead, as noted above, leads at most vaguely recommended “corrective action,” leaving it to Delgadillo to determine the appropriate level of discipline in light of any disciplines that the given employee might have received in the past, which Delgadillo ascertains from perusing the employee’s work record. It appears that the strict application of the Employer’s progressive discipline system eliminated any discretion that leads might otherwise have possessed in the course of recommending specific levels of discipline for employees accused of misconduct. To the extent that any discretion existed, it was exercised by Delgadillo or, in one instance Prakash, rather than by any leads. I further note that many of the disciplines introduced into evidence involved clear and unambiguous violations of Employer policies (e.g., misbatching, using improper codes or expiration dates, violating an Employer Guideline for Appropriate Conduct, etc.) in which discipline is essentially mandatory, rather than disciplines arising out of more subjective areas. See *Regal Health & Rehab Center, Inc.*, 354 NLRB No. 71, slip op. at 9 (2009); *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999) (authority that is limited to situations involving flagrant and egregious conduct does not normally constitute statutory supervisory authority).

The bottom line is that Delgadillo was the formal decision maker as to all disciplines issued. The bulk of the evidence supplied by the Employer through its witnesses Delgadillo and Hernandez suggested merely that leads such as Hernandez,

Antonia Jaimez, Guillermina Ramirez and Everardo Curiel served a reportorial role in informing Delgadillo or Prakash of incidents that could ultimately result in employee discipline. See *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988) (leadmen lack supervisory authority where they function as quality control employees in inspecting the work of others, report performance issues to their supervisors, and have no authority to effectuate any ultimate personnel decisions); *Allied Mechanical, Inc.*, 343 NLRB 631, 643 (2004) (mere ability to report employee problems to higher management does not confer supervisory status). While there is no evidence that Delgadillo conducted his own factual investigations after receiving reports from leads, this apparently flows not just from Delgadillo's alleged trust in his leads but because of the patently obvious and simple nature of the employees' misconduct. Nor is it entirely accurate to say Delgadillo conducted no investigation whatsoever, as Delgadillo would apparently independently explore the work history of the pertinent employee or employees in order to assess the correct level of discipline.

D. The Authority to Recommend Rewards

There is no dispute that the leads lack unilateral power to grant wage increases, promotions, or other benefits to employees. However, the Employer argues that the leads participate in rank and file employees' performance appraisals by effectively recommending the scores and narrative comments that the employees receive on such appraisals.

The Employer concedes that in 2008 and 2009 Delgadillo only consulted with first shift leads and not second shift leads in the course of preparing performance

appraisals, relying instead on Kitchen Supervisor Prakash for input as to the second shift and this absence of input from second shift leads is consistent with the testimony of second shift leads Alvizo and Martinez that they were never asked to provide any scores or narrative comments as to the employees on their shifts. The Employer argues that it used scores from second shift leads in 2007, a fact disputed by leads Alvizo and Martinez, and can only speculate that it will be involving second shift leads in the performance evaluation process in the future.

Delgadillo claims that he never changed the performance appraisal scores given by any of his leads and that Plant Manager Padilla did not change any of the scores noted by Delgadillo on the final version of the performance appraisals. The testimony in this regard is voluminous but unclear. For example, the December 2008 performance appraisal of employee Iraith Rodriguez shows that Rodriguez ultimately received scores of “3” in the categories “Initiative” and “Teamwork” even though lead Alfredo Hernandez’ had recommended scores of “4” in both the Initiative and Teamwork categories. Thus, the Employer has not dispelled the likelihood that Delgadillo overruled Hernandez’s recommended 4’s and substituted 3’s for Rodriguez in these categories, an impression that is reinforced by Hernandez’s own testimony that he provided other narrative comments about Rodriguez’s performance to Delgadillo which inexplicably failed to appear on the final version of Rodriguez’s performance appraisal issued by Delgadillo.

Even assuming that the leads provided meaningful input in the performance appraisals of the employees from their shifts, the authority to evaluate is not one of the

Section 2(11) supervisory status criteria. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536-537 (1999). Rather, when an evaluation does not by itself affect the wages and/or job status of the employee being evaluated, the individual preparing such an evaluation will not be found to be a statutory supervisor on the basis of the evaluation. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). Supervisory status is established only if there is a direct correlation between the evaluations and merit increases received by the evaluated employees. *Trevilla of Golden Valley*, 330 NLRB 1377, 1378 (2000); *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

The Employer, however, asserts that it bases employees' merit increases solely on the total score derived from the performance appraisal, as verbally relayed to Delgadillo by the leads. However, the amount of discretion which might otherwise seem to theoretically inhere in such a process appears to be absent from the process in reality. The Employer did not produce any performance appraisals in which the evaluated employee received a point score which qualified them as commendable or exceptional. Instead, Delgadillo testified that at least in 2008 and 2009, no employee received a score higher than 192 (the upper end of the meets expectations range) and there is no evidence that any employee received a score lower than 139 (the lower end of the meets expectations range). Further, the record also established that all of the employees in the meets expectation range in 2009 received 3% raises and no more, rather than there being a variety of raise amounts or percentages based on a variety of point scores, and that across-the-board increases would be given for the foreseeable future, until the economy improves. Therefore, the generalized testimony from the Employer's witnesses that a

higher score means a higher increase and a lower score means a lower increase is of little probative value under the current circumstances, since no evidence was presented that employees received any scores other than meets expectations.

Like the performance appraisals in the *Loparex* case, here, the performance appraisals do not on their face contain any recommendation regarding raises, promotions or any other type of employee reward. In *Loparex*, even though the disputed shift leaders actually filled out the performance appraisal forms, unlike the leads here who, at most, supply information that Delgadillo may use on the performance appraisal forms, the Board nevertheless found that the shift leaders' completion of appraisal forms was primarily a reporting function and therefore did not constitute the power to reward or effectively recommend rewards for employees. 353 NLRB No. 126, slip op. at 15.

Here, because there is a conflict in testimony regarding whether the leads actually provide the numerical scores used to grant merit increases, and the absence of evidence that any lead has ever provided Delgadillo with a score which resulted in an employee being denied a merit raise, there is insufficient evidence in the record to conclude that the leads possess the authority to effectively recommend rewards by virtue of their asserted participation in the appraisal process.

E. The Authority to Transfer

In its brief, the Employer argues that the leads use independent judgment when transferring employees between the kitchen and packing, because the leads assess which employees will best be able to perform jobs in a department other than their own. The Employer claims that these transfers are done without Delgadillo's involvement, such

that he only hears of such transfers after they occur. However, Employer witness and first shift kitchen lead Alfredo Hernandez testified that he consults with Delgadillo before rather than after transferring employees between departments.

While Employer counsel, through use of leading questions, sought to elicit testimony that leads take comparative skill levels into account in the course of evaluating who to transfer from one department to another, the weight of the evidence suggests that transfer decisions are not based on a comparison of employee skill levels done by leads using independent judgment, but rather on other factors such as job classifications and seniority. See *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004) (conclusory testimony in response to leading questions without supporting evidence does not establish supervisory status); *Sears, Roebuck & Company*, 304 NLRB 193 (1991).

For example, if there is a partial line shutdown in the kitchen, it appears that line associates on that line will be sent to work in packing, while line operators may remain in order to grease the line so that it is ready when it resumes being operational. If some line operators or line associates are to be sent to packing while others remain in the kitchen, those employees with greatest seniority will be given the choice of remaining in the warmer, and therefore arguably more desirable, kitchen. Second shift kitchen lead Sergio Alvizo testified that Kitchen Supervisor Mahesh Prakash rather than Alvizo makes any determination as to whether employees will be transferred from packing to the kitchen. Similarly, second shift packing lead Arturo Martinez testified that he plays no role with respect to transfers of employees from one department to another. While the Employer asserts in its brief that the Employer will sometimes pay a higher rate to an employee

whose transfer causes them to engage in more highly skilled work, I do not find that the Employer has supported this broad contention insofar as it only presented evidence of a single individual who ever received a differential based on working at a higher skilled job than her usual classification.

On the basis of the record, I am constrained to conclude that the Employer has failed to demonstrate that the leads exercise independent judgment in the course of transferring employees between departments. The evidence is conflicting as to whether the threshold authority to transfer has been shown at all. Furthermore, even assuming such an authority, it appears that the leads base their decisions upon employee seniority and/or job classifications, not on any sophisticated comparison of employees' relative skills and talents.

F. The Authority to Effectively Recommend Hiring

It is well established that the ability to hire or to effectively recommend hiring confers supervisory status only when exercised with independent judgment on behalf of management. See *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Recommending an applicant for hire contemplates more than merely screening applicants or engaging in other ministerial participation in the interview process. *Bowne of Houston*, 280 NLRB at 1225. Moreover, a putative supervisor who simply advises management about an applicant's work experience or technical skills does not make a hiring decision or effective recommendation in circumstances where management also interviews the applicants and has final hiring authority. *The Door*, 297 NLRB 501 (1990); *Aardvark Post*, 331 NLRB 320 (2000).

1. The Recommending of Temporary Employees for Permanent Hire

I turn now to the issue of whether the leads recommend the hiring of temporary employees. The Employer argues that it depends entirely upon the input of leads in deciding which temporary employees should be hired. Despite this allegedly substantial reliance, Delgadillo conceded that none of the alleged recommendations from leads are in writing and that Delgadillo does not make any notes of the hiring recommendations allegedly given by the leads regarding temporary employees. I also find it curious that despite such an absence of records, Delgadillo professed to be able to remember which temporary employees had been hired on the basis of recommendations from leads yet could not recall which temporary employees had been hired on the basis of recommendations from Kitchen Supervisor Prakash, even though Delgadillo claimed that Prakash had made such recommendations. To the extent that Delgadillo repeatedly testified that he relies exclusively on input from his leads as to worker performance, this testimony is counterbalanced by his admission that he spends 20 to 25% of his time on the shop floor and thus would necessarily have his own opportunity to observe the work performance of kitchen and packing employees.

I initially note that it appears that most of these permanent positions only became available to temporary employees because they were previously posted to the public and at the plant but no members of the public or extant regular employees applied for the positions. Thus, the pool of potentially qualified candidates was dramatically small or reduced from the outset, prior to any alleged recommendation from any lead. I also note that it appears from the record that most employees who obtained regular permanent

positions without ever having served as temporary employees were required to undergo job interviews before being selected for their positions. Therefore, it must be assumed that any testimony offered by the Employer with respect to the effective recommendation of persons for hire without any interview relates solely to effective recommendation of temporary employees by leads.

In assessing the Employer's ostensible illustrations of lead power to effectively recommend hiring, I find that they suffer from one or more of the following defects: (1) they do not reflect independent judgment on the part of the lead allegedly recommending the hire, often because the Employer offered no specific evidence as to the basis or bases for the alleged recommendation; (2) conflicts exist between the testimony of Delgadillo and the leads about whom Delgadillo testified; (3) a lack of other applicants for the position that the person receiving the alleged recommendation ultimately obtained; and/or (4) lack of any corroboration of Delgadillo's testimony.

More specifically, other than Maricela Rodriguez and Rosario Del Toro, the Employer did not present testimony from any of the alleged beneficiaries of the hiring recommendations testified at the hearing in this matter. Thus no evidence was produced by the Employer regarding the allegedly significant role played by leads in connection with other temporary employees' permanent hire by the Employer, or to corroborate any of the testimony provided by Delgadillo. Rodriguez and Del Toro, either testified to no role played by any leads or at most a minor role (e.g., the role of Antonia Jaimez in the hiring of Rosario Del Toro). When pressed for the basis for recommendations of hires, the Employer's witnesses resorted to use of platitudes by leads such as "good worker" or

“punctual”, but they did not provide a concrete factual basis for any of the hiring recommendations. Indeed, on one of the rare occasions a factual basis was provided (e.g., regarding employee San Juana Diaz), it appears the recommendation was based on Diaz’s attendance, a basis which clearly does not require any independent judgment on the part of the lead making the recommendation. On several occasions, it appeared that leads simply passed on names of several potential candidates for a position rather than advocating one person over the others. Indeed, with respect to employee Maria M. Lopez, the evidence established that two or three other people were hired on the same day as she, so there is no clear indication that she was recommended over anyone else. Conversely, it does not appear that there were any other candidates for the position obtained by employee Rosalva Pantoja, so there is consequently no basis for finding any effective recommendation as to Pantoja. See *Children’s Farm Home*, 324 NLRB 61 (1997) (authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed).

Finally, given the conflicts between the testimony of Delgadillo on the one hand and the testimony of Sergio Alvizo and Arturo Martinez with respect to leads’ power to recommend hiring, I cannot find that the Employer satisfied its burden of demonstrating that leads effectively recommend initial hiring using independent judgment. The Employer simply failed to provide sufficiently concrete, specific and non-conclusory bases for the hiring recommendations. It appears that many of these recommendations were made with little depth of assessment due to the fungible nature of employees who

perform the Employer's production work. Thus, the very nature of the production work precludes the necessity to use independent judgment in recommending that a temporary employee, already satisfactorily working in production, would be an adequate permanent line worker. As a consequence, the Employer failed to establish that leads exercised independent judgment in the course of recommending such hires. I, therefore, conclude that the Employer has failed to demonstrate that the leads exercised the Section 2(11) power of effectively recommending the hire of employees.

2. Recommendations Regarding Completion of Probation

It is undisputed that former temporary employees who are converted to a regular position then undergo a 90-day probationary period in order for the Employer to ascertain whether they are performing satisfactorily as regular employees. While Delgadillo inexplicably testified that former temporary employees "sometimes do and sometimes don't" serve probationary periods, the record indicates, on balance, that most temporary employees converted to regular employees do serve probationary periods. Delgadillo testified that at the conclusion of the 90-day probationary period, the lead of the probationary employee will meet with him and recommend either that the probationary employee be made permanent as having performed satisfactorily during the probationary period, at which time the employee will receive a 25 cent per hour raise, or that the probationary employee be terminated as having not performed satisfactorily during the probationary period. Delgadillo, and not the lead, prepares a written 90-day evaluation form. Consistent with Delgadillo, Plant Manager Padilla testified that all leads supply information to Delgadillo for use on the 90-day evaluation forms, further speculating that

second shift kitchen lead Sergio Alvizo, and second shift packing leads Antonia Jaimez and Arturo Martinez provide such information to Delgadillo. However, the Employer provided no evidence about the factors relied on by any lead in making such a recommendation. Moreover, despite Padilla's apparent belief as to the leads' role, leads Alvizo and Martinez testified emphatically that they played no role in evaluating probationary employees, made no recommendation as to whether any probationary employees should be retained, and were never asked to make such a recommendation or to provide any information to the Employer for its use on any 90-day evaluation form.

In addition, the Employer did not submit any evidence that any employee was ever terminated for unsatisfactory performance at the conclusion of his or her 90-day probationary period, much less that any such termination was based on a recommendation from a lead. Moreover, the Employer failed to introduce any written 90-day evaluation forms into the record. Given the conflicting testimony discussed above, I find that the Employer has failed to satisfy its burden of demonstrating that the leads effectively recommend that employees have satisfactorily completed their probationary periods or that any purported recommendations implicate independent judgment.

G. Secondary Indicia

In the absence of any compelling evidence of primary indicia of supervisory status, secondary indicia, such as higher pay than other employees, job titles, and attendance at management meetings, are insufficient to establish supervisory status. *Stanford New York LLC d/b/a Stanford Hotel*, 344 NLRB No. 69 (2005); *Volair*

Contractors, Inc., 341 NLRB 673, 674 n. 8 (2004). See also *Tri-City Motor Company, Inc. d/b/a Auto West Toyota*, 284 NLRB 659, 661 (1987) (higher wage rates for foremen do not conclusively prove supervisory status). On balance, I find that the evidence of secondary indicia in this case does not support a finding of supervisory status.

The Board has consistently held that an employee's service as the highest ranking employee on duty is a secondary indicium of supervisory status that, by itself, is insufficient to demonstrate supervisory status. *Loyalhanna Care Center*, 352 NLRB 863, 864-865 (2008); *Golden Crest*, 348 NLRB 727, 730 n. 10 (2006). The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. *Kanahwa Stone Company*, 334 NLRB 235, 237 (2001). Thus, I do not find the evidence that leads Sergio Alvizo or Arturo Martinez occasionally are the highest ranking persons present at times when neither Delgadillo, Prakash nor Preston are present to support a conclusion of supervisory status in this case. While the record reflects that packing room leads have a work table with a computer on it, there is no evidence that kitchen leads have any such area, and no evidence that any leads have their own offices or cubicles.

While evidence was adduced that production managers like Delgadillo and Prakash regularly met with leads, with Delgadillo meeting with first shift leads at 4:45 a.m. and with second shift leads at 12:30 p.m., the Employer did not offer evidence as to whether the leads actively participate in such meetings or instead just passively receive information. See *RCC Fabricators, Inc.*, 352 NLRB 701, 714 (2008) (relying upon foremen's active participation in and not mere attendance at weekly production meetings). Further, the Employer failed to furnish evidence that leads participate in any

meetings of upper management such as those convened between Plant Manager Steve Padilla and managers from the Employer's New York headquarters.

I further note that the leads in this case are paid an hourly wage, like the rank and file employees beneath them. See *Loparex, LLC*, 353 NLRB No. 126, slip op. at 15 (2009) (relying upon both shift leaders and crew members receiving hourly wages, while team managers were salaried employees). Concededly, as the Employer argues, the leads are in Pay Band 5 (ranging from \$10.72 to \$15.86 per hour), which is the highest paid band of the five bands used for hourly employees at the facility. Conversely, however, because of the wide range of salaries across each pay band, it is possible for more senior line associates to earn more money per hour than a more junior lead. For example, the record reflects the existence of a senior line operator in Pay Band 3 earning \$11.17 per hour, and a relief line operator in Pay Band 3 earning \$11.47 per hour, both of which are more than the \$10.72 earned by junior sanitation lead Juan Diego Alvarez in Pay Band 5. The same pay chart produced by the Employer also reflects cooks in pay bands 1, 2 and 3 earning \$11.57, \$11.52, \$11.42, and \$11.37, all in excess of the \$10.72 earned by Juan Diego Alvarez. Nor is there any difference between the fringe benefit packages and vacation available to leads and those available to regular employees.

The Employer argues in its brief that a finding that the kitchen and packing leads do not constitute statutory supervisors would create a "skewed" ratio in which the four stipulated supervisors, Padilla, Delgadillo, Preston and Prakash, would be responsible for over 80 employees. I note, however, that the ratio of Delgadillo to 37 kitchen and packing employees, not counting leads or temporary employees, on the first shift, or the

ratio of Prakash and Preston to 35 kitchen and packing employees, not counting leads or temporary employees, on the second shift, are not outside the realm of what the Board has previously found permissible. See *Loparex, LLC*, 353 NLRB No. 126, slip op. at 16 (where work of employees is unskilled, a low supervisory ratio weighs against viewing shift leaders as supervisors); *NLRB v. GranCare*, 170 F.3d 662, 667 (7th Cir. 1999) (en banc) (where finding of supervisory status would result in ratio of 59 supervisors to 90 nonsupervisors, “such a highly improbable ratio of bosses to drones ‘raises a warning flag’”).

Finally, to the extent that the Employer argues that it has held out the leads to employees as supervisors, it is well established that an employer’s holding out an individual to employees as a supervisor is not dispositive of supervisory status, and an employee will not be found to be a supervisor absent evidence that he or she exercises any of the primary indicia of supervisory status. *Williamette Industries, Inc.*, 336 NLRB 743, 744 (2001); *Polynesian Hospitality Tours*, 297 NLRB 228 (1989).

I also note that with respect to all alleged indicia of supervisory status, Production Manager Delgadillo conceded that there was no real difference in the work performed by the disputed kitchen and packing leads as contrasted with the work performed by leads in sanitation, quality control, finished goods and warehouse departments, all of whom the Employer stipulated were not statutory supervisors. I find that this admission on the part of the Employer, along with the absence of any substantial evidence differentiating the roles of the disputed leads from those of the leads in other departments who are stipulated to be Section 2(3) employees, undercuts the Employer’s position in this case.

Therefore, an analysis of the secondary indicia supports my conclusion that the leads are not supervisors within the meaning of Section 2(11) of the Act.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Petitioner Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time kitchen, packing, sanitation, receiving, finished goods, quality assurance, and maintenance employees, including kitchen leads, packing leads, quality control leads, sanitation leads, finished goods/warehouse leads, quality control technicians, quality control technician II's, quality control technician III's, quality control technician IV's, maintenance mechanic, maintenance mechanic II, mechanic helper, line operator, relief line operator, assistant operator, line associate, cook, weight auditor, chiller attendant, kettle washer, sanitation associate, forklift operator, warehouse associate, warehouse worker, and finished goods warehouse associate, employed by the Employer at its Turlock, California facility located at 600 South Tegner Street, Turlock, CA; excluding all other employees, including employees provided by temporary

employment and placement agencies, Plant Manager, Quality Control Manager, Maintenance Manager, Production Manager, Production Supervisor, Kitchen Supervisor, Warehouse Supervisor, Distribution Manager, Distribution Supervisor, drivers, dispatchers, office clerical and administrative employees, managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Teamsters Union Local 948, International Brotherhood of Teamsters**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **March 19, 2010**. No extension of time to file this list will be

granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website, www.nlr.gov,³ by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continued to be placed on the sending party. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

³ To file the eligibility list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-filing** link on the menu, and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on **March 26, 2010**. The request may be filed electronically through the Agency's website, www.nlr.gov, but may **not** be filed by facsimile.⁴

Dated at Oakland California this 12th day of March, 2010.

/s/ Alan B. Reichard
Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32

32-1356

⁴ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's web site, www.nlr.gov.

